IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.240 OF 2007
IN
APPEAL FROM ORDER NO.792 OF 2006

CIVIL APPLICATION NO.1087 OF 2006

Bajrang P. Sharma ..Applicant

V/s.

Bishwanath Das & ors. ..Respondents

Mr.Z.K.Dalal i/b. Mr.Y.K.Tiwari for applicant
Mr.M.P.Vashi for respondent Nos.1 and 2
Mrs.Geeta Joglekar for respondent No.3
Mr.N.D.Jaywant for respondent Nos.4 to 8

CORAM : A.S.OKA, J.

DATE : 10TH APRIL, 2007

P.C.

1. The learned advocates appearing for the parties state that the applicant, the respondent No.1 and the respondent No.2 are personally present in the Court.

2. Heard the learned advocates appearing for the parties. This application has been filed by the first respondent in the appeal from order praying for following reliefs :-

(a) That this Hon'ble Court be pleased to direct the Respondent No.1 to shift to flat Nos.401 and 402 and Respondent No.2 to shift to flat No.302 in the building Supradham situate at 5 Tejpal Scheme Road No.4, Vile Parle (East), Mumbai – 400 057 and to hand over vacant and peaceful possession of the transit shed and covered stilt portion in the said building to the Petitioner.

(b) That this Hon'ble Court be pleased to modify the interim order dated 21st November, 2006 passed by His Lordship Mr.Justice D.G.Karnik in Civil Application No.1087 of 2006 thereby allowing the Petitioner to demolish the transit shed and covered stilt portion in thebuilding Supradham situate at 5 Tejpal Scheme Road No.4, Vile Parle (East), Mumbai – 400 057

For the sake of convenience, I have hereinafter referred to the parties with reference to their status in the trial Court. The appeal from order is filed by the original plaintiff. The suit filed by the plaintiff is for declaration that the transit shed and covered stilt portion constructed on the suit property be continued till completion of the construction of the building by the defendant No.1 developer. The challenge in the suit

is to a notice issued by the second defendant Municipal Corporation on 22nd July, 2005.

3. The plaintiff claims to be the owner of a plot of land which is more particularly described in the plaint. He had obtained a Building Permission for construction of building. On 22nd July, 1998 there was a Development Agreement entered into by and between the plaintiff and defendant No.1. It was agreed that the defendant No.1 will provide two flats and two garages to the original plaintiff and one flat to one Deepak kumar Das who is a nephew of the plaintiff and who is the defendant No.8 in the suit. Initially, the agreed consideration was Rs.28,00,000/-. There was some dispute between the parties. A complaint was filed by the flat Purchasers of the flats in the building constructed by the first defendant. The plaintiff and the first defendant were parties to the dispute. The dispute ended by filing the consent terms before the National Commission at New Delhi under the Consumer Protection Act, 1986. The compromise was filed on 18th September, 2001. It was

agreed between the plaintiff and the defendant No.1 that apart from the balance consideration of Rs.24,50,000/-, the defendant No.1 will pay compensation of Rs.12,00,000/- to the plaintiff. A sum of Rs.20,00,000/- was to be paid by the defendant No.1 to the plaintiff after the plaintiff executed a Power of Attorney as per the draft which was already finalized. Consent terms record that balance amount of Rs.16,50,000/- was to be paid by the defendant No.1 to the plaintiff within a period of three months from the date on which the plaintiff will handover possession of the temporary transit accommodation occupied by him to the first defendant. Consent terms provide that plaintiff will take possession of the flats alloted to him on the 4th floor in exchange of temporary accommodation subject to receipt of Occupation Certificate. It was agreed that the plaintiff will vacate the temporary accommodation and will take possession of flats on the 4th floor.

4. As of today, there is no dispute between the parties that construction upto and inclusive of 4th

floor has been completed by the defendant No.1. It is also not in dispute that there is an Occupation Certificate granted in respect of a part of the building upto 3rd floor. The third to seventh defendants are purchasers of the flats on 1st, 2nd and 3rd floors who have already occupied their respective flats. A communication/order was passed by the Municipal Corporation on 22nd July, 2005. The contention of the plaintiff is that the said order was passed without notice to him. In the said order, it is stated by the Executive Engineer of the Building Proposal Department of the Municipal Corporation that a part Occupation Certificate in respect of flat Nos. 101, 201 & 301 has been granted on 18th January, 2002 subject to condition that transit sheds shall be demolished within 15 days. By the said letter, a request was made to demolish the unauthorized covering of stilt and transit sheds within a period of seven days. While admitting the appeal on 21st November, 2006, this Court granted interim relief in terms of prayer clause (c) of Civil Application No.1087 of 2006 by which it was directed that the possession

of the transit accommodation provided to the plaintiff and defendant No.8 shall not be disturbed. The said order passed by this Court records that the grant of interim relief will not prevent the Municipal Corporation from granting hearing to the appellants and thereafter, proceeding in accordance with law. In the present Civil Application reliance has been placed on order dated 15th December, 2006 passed by the Executive Engineer, Building Proposal Department of the Municipal Corporation. The said order has been passed after giving hearing to all concerned parties. The operative part of the order reads thus :-

O R D E R

> The total area of the plot under reference as per the various documents seen in the file is 399.60 sq.mtr.
>
> The set back area is 15.00 sq.mtr.
>
> The net plot area is 384.60 sq.mtr. The set back area is yet to be handed over to MCGM. The permissible built up area after handing over the set back area and availing the FSI in lieu of set back area will be 399.60

sq.mtr.

The Proposed built up area is 372.25 sq.mtr. The plans are seen approved for stilt + 4th floor for built up area 372.25 sq.mtr. Thus the total built up area will have to be kept within the permissible limit of 399.60 sq.mtr.

The C.C. Upto 4th floor top has been granted. Accordingly, the work is reportedly completed on site. In order to keep the total built up area within the permissible limit, it is necessary to demolish the transit shed as also the portion of stilt covered. The area under transit shed + covered in the stilt portion is about 40.00 sq.mtr. Thus there is an excess in the total built up area. Unless the said structures are demolished, further occupation to the building cannot be granted.

5. In the present application, it is pointed out that respondent Nos.4 to 8 in this Application are flat purchasers of the flats in the building. It is pointed out that Occupation Certificate in respect of the building upto 3rd floor has been granted subject to condition of demolition of transit sheds. The said flat purchasers are suffering from several difficulties as a result of the non-compliance with the condition. It is pointed out that the respondent Nos.4 to 8 are required to spend huge amount by way of water charges at a higher rate. Therefore, prayer in the

application is that plaintiff (first appellant) be directed to shift to the flat Nos.401 and 402 and defendant No.8 (Second appellant) be directed to shift to flat No.301 in the newly constructed building and they may be directed to handover vacant possession of the transit sheds. Reliance has been placed on the order dated 15th December, 2006 passed by the executive engineer of the Municipal Corporation.

6. The applicant has deposited a sum of Rs.20,00,000/- in this Court without prejudice to the rights and contentions of the parties. This application is opposed by the plaintiff and the eight defendant on several grounds. The first ground is that the original plaintiff is 76 years old and there is no lift provided to the flats on the fourth floor. It is pointed out that Occupation Certificate is not granted in respect of the said flats. It is further contended that instead of the defendant No.1, now a third party is carrying out development. It is contended that an attempt is to construct 5th & 6th floor by obtaining

relief in this application. It is also pointed out that the order passed by the Executive Engineer on 15th December, 2006 has been challenged by the plaintiff by filing a separate suit. It is pointed out that the defendant No.1 has committed breaches of the agreement and has not made payments as per the agreement.

7. An affidavit has been filed by the defendant No.1. In the said affidavit, the defendant No.1 has offered two flats to the original plaintiff by way of temporary accommodation in lieu of the transit sheds till Occupation Certificate in respect of the 4th floor of the building is granted. The description of the said flats has been mentioned in the affidavit. It is stated that so far as 8th defendant is concerned, he has already occupied flat No.301 in the new building. It is also stated that the defendant No.1 will install a lift in the building at his own cost within one month from the date on which the plaintiff and defendant No.8 will vacate the transit accomodation. A reply has been filed by

the plaintiff to the said affidavit alleging that now the work of development is being carried out by some other builder. It is stated that the first defendant has committed default in compliance with the terms and conditions of the agreement.

8. The order dated 22nd July, 2005 was passed by the Executive Engineer without hearing the plaintiff. Now there is an order dated 15th December, 2006 passed by the Executive Engineer in which it is stated that if transit sheds and covered portion of stilt are demolished, the defect will be cured and the construction upto 4th floor will be within permissible limits of F.S.I. The order records that a Commencement Certificate only upto 4th floor has been granted and work has been completed on the site. It is not disputed before me that the defendant No.8 has occupied flat No.301 on the third floor which was to be alloted to him under the agreement. It is expressed that there is no sufficient water supply to the third floor and electricity supply is granted on a temporary basis. The same are difficulties faced by third party flat

purchasers i.e. the respondent Nos.4 to 7 in this application who have occupied flats on the first, second and third floors as Occupation Certificate in respect of the first to third floor is granted subject to condition of the demolishing transit sheds. The construction of the fourth floor is complete. If the lift is installed and Occupation Certificate is granted, it is obvious that both flats i.e.flat Nos.401 & 402 which are to be alloted to the plaintiff will be ready for occupation. The fact remains that, as of today, temporary accommodation is provided to the plaintiff and the defendant No.8 in the form of transit sheds on the same property. There are various disputes going on between plaintiff and defendants. The said disputes will go on. In the meanwhile, the other flat purchasers cannot be allowed to suffer. Whether defendant No.1 has committed breaches and defaults is a question which is to be decided in the pending proceedings. As of now, subject to outcome of all the pending proceedings if plaintiff occupies the two flats on the fourth floor, there will not be any prejudice

to any party. A sum of Rs.20,00,000/- has been already deposited by the first defendant. Without prejudice to the rights and contentions of the parties, the plaitniff can be permitted to withdraw a sum of Rs.12,00,000/- obviously only if he vacates the transit sheds and covered portion of stilt. Till the time Occupation Certificate in respect of the fourth floor is not granted, the first defendant has offered temporary accommodation to the plaintiff. In the affidavit dated 10th April, 2007, the first defendant has offerred to provide temporary accommodation to the plaintiff by way of one of the two flats, the description of which has been incorporated in the said affidavit. Both the flats are available with the first defendant and as per choice of the plaintiff, the first defendant will allot one of the two flats to the plaintiff. The said flat can be occupied by the plaintiff till the Occupation Certificate in respect of the flats on the 4th floor is granted.

9. If this arrangement is made, it will not cause prejudice to either parties. The plaintiff

will get better accommodation than the present transit sheds and the third party flat purchasers will get regular electricity and water supply to their respective flats. The defendant No.8 has already taken possession of flat No.301 and therefore, there is no prejudice to him. Moreover, this arrangement will be without prejudice to rights and contentions of the parties in the pending proceedings. The interim relief granted earlier will have to be modified in view of the subsequent events referred to above.

10. Hence, Civil Application is disposed of by passing the following order.

O R D E R

a) The interim relief granted by this Court by an order dated 21st November, 2006 is modified.

b) The original plaintiff and the defendant No.8 are directed to vacate the transit accommodation as well as the covered portion of the stilt of the newly constructed building within a period of three weeks from today. The plaitniff will shift to the

temporary transit accommodation offered by the defendant No.1 within the said period of three weeks. After the expiry of period of three weeks, it will be open to the defendant No.1 to demolish the transit sheds and covered portion of the stilt.

c) The undertakings of the defendant No.1 in paragraphs 3 and 4 of affidavit dated 10th April, 2007 are accepted.

d) The defendant No.1 will ensure that the transit accommodation offered by him will remain available to the plaintiff till Occupation Certificate is granted.

e) Within a period of 15 days from the date on which the defendant No.1 intimates to the plaintiff as regards grant of Occupation Certificate in respect of the flats on the 4th floor and the installation of the lift, the plaintiff will shift to flat Nos.401 and 402 in the newly constructed building.

f) On vacating the transit sheds and the covered portion of the stilt, plaintiff will be entitled to withdraw a sum of Rs.6,00,000/- deposited by the defendant No.1 in this Court. After the plaintiff vacates the new transit accommodation offered by the defendant No.1, the plaintiff will be entitled to withdraw a further amount of Rs.6,00,000/- deposited by the defendant No.1 in this Court.

g) The defendant No.8 is free to continue to occupy flat No.301 on the third floor of the building.

h) It is made clear that the aforesaid arrangement is only by way of an interim arrangement and the same is without prejudice to the rights and contentions of parties in all the pending proceedings. It is made clear that no equities will be created by virtue of this

order.

i) Civil Application is disposed of accordingly.

j) Parties and concerned officer of this Court to act on the authenticated copy of this order.

(**A.S.OKA, J.**)